83-992

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1983

DETROIT HEALTH CORPORATION and
WILLIAM F. HUBNER,
Petitioners,

v.

DENISE BENCE, et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether greater potential for sales and greater sales volume in the women's division of Detroit Health Corporation, as compared to potential for sales and sales volume in the men's division, constitute a "factor other than sex" within the meaning of the Equal Pay Act which permits the payment of commissions on sales by the female employees of the women's division at a lower rate than is applicable to sales by the male employees of the men's division, when the different rates result in essentially equal compensation?

PARTIES TO THE PROCEEDING IN THE SIXTH CIRCUIT COURT OF APPEALS

Petitioners are Detroit Health Corporation, a Michigan corporation, and William F. Hubner, its president.

Respondents are Denise Bence, Shirley Stan, Teddi Reardon, Sherry Pringham and Joane Gambino, former employees of Detroit Health Corporation.

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit, entered on July 11, 1983 and reported at 712 F.2d 1024, is set forth at Appendix 1a. The Opinion of the District Court for the Eastern District of Michigan, entered on September 11, 1981, is set forth at Appendix 34a.

The original Opinion of the District Court for the Eastern District of Michigan, entered on September 14, 1979, is set forth at Appendix 20a. The Order of the Court of Appeals for the Sixth Circuit, entered on April 14, 1981, remanding the case to the District Court, is reported at 657 F.2d 266 and is set forth at Appendix 32a.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on July 11, 1983. A timely Petition for Rehearing *en banc* was denied on September 19, 1983, and this Petition for Writ of Certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

United States Code, Title 29:

§206(d) (1) *Prohibition of Sex Discrimination*

No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to the employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any other factor other than sex[.]

STATEMENT OF THE CASE

A. History of the Case

This dispute involves a challenge by Respondents ("Bence") of the commission system utilized by Detroit Health Corporation ("Detroit Health"), in determining earnings of its male and female commissioned employees. A Complaint was filed in the United States District Court, Eastern District of Michigan, on or about January 26, 1977, in which it was alleged, *inter alia*, that the commission system utilized by Detroit Health violates the Equal Pay Act of 1963, 29 U.S.C. §206(d). Jurisdiction of the District Court was based upon the Equal Pay Act and upon 28 U.S.C. §1331 (general federal question jurisdiction).

After Defendants' Answer was filed, Bence and Detroit Health, through their respective counsel, entered into a written stipulation of relevant facts which was thereafter filed in the District Court, together with Cross-Motions for

Summary Judgment. The District Court, on September 14, 1979, issued its Opinion and entered final Judgment in favor of Detroit Health in accordance with Rule 54(b), Federal Rules of Civil Procedure.

On appeal, the Sixth Circuit reversed the District Court, finding that material issues of fact existed and directing the District Court to conduct further proceedings and to enter findings of fact and conclusions of law. Upon remand, a bench trial was conducted and on September 11, 1981, the District Court entered its Findings of Fact and Conclusions of Law, granting Judgment in favor of Detroit Health.

Bence again appealed to the Sixth Circuit and, on July 11, 1983, the Court issued its decision, reversing the District Court and finding the commission system of Detroit Health to be in violation of the Equal Pay Act of 1963. A timely Petition for Rehearing was denied on September 19, 1983.

B. Facts Material to Consideration of Question Presented

Detroit Health operates a chain of health spas within the State of Michigan. For various business reasons, the corporation is divided into a men's division and a women's division, with one division operating a given spa Monday, Wednesday and Friday, and the other on Tuesday, Thursday and Saturday. The determination of which division operates on which days varies from spa to spa.

The men's division is operated by male personnel, attracting and servicing male members and guests. Conversely, the women's division is operated by female personnel, attracting and servicing female members and guests.[1] The employees in each division, at each spa, consist typically of a manager, an assistant manager and instructors.

Historically and consistently, the volume of sales of memberships by Detroit Health to females through its women's division has been higher than the sales of member-

[1] There has never been an allegation that the use of exclusively males to attract and service males and exclusively females to attract and service females is in any way unlawful.

ships to males through the men's division. While there have been temporary deviations, when measured over representative periods of time, sales by Detroit Health to females exceed sales to males by 50%. (Def. Ex. 21).

> [D]efendants are engaged in a business in which there are more potential female customers than male and in which history has demonstrated conclusively that the membership breakdown will be sixty percent female and forty percent male. In short, defendants have shown by a preponderance of the evidence that a male manager and a female manager, sitting at the same desk in the same spa and expending the same amount of effort, under totally equal conditions, will have a net sales result of six membership sales to females and four membership sales to men. This is not to suggest that on a one-to-one basis a sale to a potential woman customer is any easier than a sale to a male customer. To the degree that this court's opinion on the summary judgment motion referenced easier sales to women, it was not intended to be a qualitative analysis but a quantitative one. There are simply more potential female customers in a consistent ratio of 60/40 and, with the same expenditure of effort, male and female managers will produce sales figures resulting in a 60/40 female/male membership. (Findings of District Court, Appendix 38a.)

At all material times relevant to this dispute, managers and assistant managers were compensated exclusively on a commission basis. The male manager of a spa was paid 7.5% of sales to males; the female manager was paid 5.0% of sales to females. Male assistant managers were paid 4.5% of sales to males while female assistant managers were paid 3.0% of sales to females. Because of the historical and consistent ratio of male to female sales, however, the commission percentages established by Detroit Health have resulted in essentially equal compensation for male and female commissioned employees. (Def. Ex. 6,7). Indeed, without the difference in commission percentages applied to sales, male employees would consistently earn one-third

less than females who sell in the more lucrative women's market, even though their jobs involve work requiring equal skill, effort and responsibility and are performed under similar working conditions.

> The net result of this is that, since the commission rates of seven and one-half percent for men and five percent for females are pegged to this same ratio, female and male managers at the same location will make, for all practical purposes, the same salary. To the degree that there are differentials, as many times as not the female manager will make more money than her male counterpart. The defendants have thus, based upon figures that have been conclusively proved to be historically accurate, seized upon a system for equalizing pay rather than having established a system which is discriminatory in a manner violative of the Equal Pay Act. (Findings of District Court, Appendix 38a-39a.)

The United States Court of Appeals for the Sixth Circuit disagreed and reversed the District Court. The Sixth Circuit's reasoning is not entirely clear except that the Court asserts the result is necessary to "effectuate the broad remedial purposes of the Equal Pay Act."

REASONS FOR GRANTING THE WRIT

A. The Decision of the Sixth Circuit Conflicts in Principle and Approach With Decisions of Other Courts of Appeals as to the Proper Interpretation and Application of the "Factor Other Than Sex" Exception Contained in the Equal Pay Act of 1963.

The Equal Pay Act of 1963 prohibits the payment of wages to employees of one sex at a rate less than the rate at which employees of the opposite sex are paid for equal work on jobs requiring equal skill, effort and responsibility and which are performed under similar working conditions. Four exceptions to the general prohibition are set forth in the Act, including the broad general exception which per-

mits different rates of pay when "based on any other factor other than sex." 29 U.S.C. §206(d)(1)(iv).

Numerous cases have involved the application of the broad "factor other than sex" exception to factors traditionally or customarily used in determining wage or salary levels, such as education, prior experience or expertise. The exception, however, relates to *any* factor other than sex—the language of the statute does not limit the exception to job-related considerations.

For years, the leading case applying the "factor other than sex" exception in a broad and literal manner has been *Hodgson* v *Robert Hall Clothes, Inc.*, 473 F.2d 589 (3rd Cir. 1973), *cert. den.*, 414 U.S. 866 (1973). In *Robert Hall*, higher wages were paid to the male employees of the men's clothing departments than were paid to the female employees of the women's clothing departments. In rejecting the argument that only factors which are related to job performance or which are typically used in setting wage scales are contemplated by the exception, the Court found that the greater profitability of the men's department justified the difference in compensation. The Court held that *any* legitimate business reason, unrelated to sex, could constitute a factor to justify pay differentials.

> The overwhelming evidence which showed that the men's department was more profitable than the women's was sufficient to justify the differences in base salary. These statistics proved that Robert Hall's wage differentials were not based on sex but instead fully supported the reasoned business judgment that the sellers of women's clothing could not be paid as much as the sellers of men's clothing. Robert Hall's executives testified that it was their practice to base their wage rates on these departmental figures.
>
> While no business reason could justify a practice clearly prohibited by the Act, *the legislative history set forth above indicates a Congressional intent to allow reason-*

able business judgments to stand. 473 F.2d at 597 (Emphasis added).

The general exception to the Equal Pay Act of 1963 was more recently reviewed and discussed by the United States Court of Appeals for the Ninth Circuit in *Kouba* v *Allstate Ins. Co*, 691 F.2d 873 (9th Cir. 1982). In that case, the employer paid lower wages to certain new female sales agents based, in part, upon the lower prior salaries of the female agents. Allstate reasoned that its guaranteed monthly minimum salaries must be tied to prior salaries because if the minimum far exceeded the amount previously earned by the agent, he or she might become complacent and not fulfill his or her selling potential.

The District Court had found that Allstate's method of computing salaries was unlawful. After a careful analysis of the "factor other than sex" exception to the Equal Pay Act, including its legislative history, the Ninth Circuit concluded that the Equal Pay Act did not impose a strict prohibition against use of prior salary and reversed and remanded the case for further proceedings. In short, the Ninth Circuit also adopted a broad reading of the "factor other than sex" exception to the Act and rejected plaintiff's contention that the exception was intended by Congress to relate only to factors traditionally associated with job evaluations.

> In drafting the Act, however, Congress did not limit the exception to job evaluation systems. Instead, it excepted "any other factor other than sex" and thus created a "broad general exception." H. R. Rep. No. 309, 88th Cong., 1st Sess. 3, *reprinted in* 1963 U.S. Code Cong. & Ad. News 687, 689. While a concern about job evaluation systems served as the impetus for creating the exceptions, Congress did not limit the exception to that concern. 691 F.2d at 877.

In the instant case, the Sixth Circuit neither endorsed nor rejected the interpretation of the exception set forth in

Robert Hall and *Kouba* explicitly, although its ruling cannot be reconciled with the "legitimate business reason" test adopted by the Third and Ninth Circuits. Moreover, the result in the instant case is diametrically opposed to the results in *Robert Hall* and *Kouba*.

In *Robert Hall*, the Court approved the payment by an employer of *less* compensation to females working in the women's clothing department than the employer paid to male employees in the men's clothing department because the men's clothing department was more profitable—the factor other than sex relied upon by Robert Hall.

In *Kouba*, the Ninth Circuit refused to find unlawful the payment of a *lower* salary to a female employee, performing the same work as her male counterpart, because the employer based its salary decision, in part, upon the female employee's salary in her prior employment - the factor other than sex relied upon by Allstate.

In the instant case, the Sixth Circuit rejected greater potential for sales and greater sales volume in the women's division as a "factor other than sex" and condemned a pay practice of Detroit Health which results in *equal* compensation for males and females, ruling by implication that females must be paid half again as much as their male counterparts if Detroit Health is to utilize a commission system.

B. The Decision of the Sixth Circuit Conflicts in Principle with an Interpretive Opinion of the Wage and Hour Division, U.S. Department of Labor, and Conflicts with a Ruling by the District Office, EEOC, on the Legality of Detroit Health's Commission Pay System.

In 1964, the Wage and Hour Division of the Department of Labor was asked about the legality, under the Equal Pay Act, of a retailer paying higher commission rates to salesmen than to saleswomen in order to equalize earnings. The men and women were employed in the same department selling the same merchandise but the salesmen were required to devote some time each day to stock work,

thus losing time on the sales floor earning commissions. The Administrator issued the interpretive Opinion finding the system lawful. See Appendix 48a.

> However, even though the employees involved are found to be performing "equal work" within the meaning of the Act, the payment of a higher commission rate to some employees would not necessarily be in violation of the equal pay provisions of the Act if the employer can show that the differential is not based on sex but, as you indicate, merely to compensate those employees performing stock work for time lost on the sales floor. In such a case, the employer would have to show that there is reasonable relationship between the amount of the differential and the weight properly attributable to the factor other than sex. (See section 800.115(d) of the bulletin.) It would seem, for example, as between male and female salespersons of comparable competence, that where a higher commission rate is paid for the reasons you indicate, *the earnings of the male and female salespersons should be equal in the final analysis since the differential is allegedly paid to effect an equalization of earnings*. (Emphasis added).

The holding of the Sixth Circuit in the instant case squarely contradicts the above-quoted Opinion of the Wage and Hour Division, which has been in effect for almost 20 years.

In 1978, responsibility for enforcement of the Equal Pay Act was transferred to the Equal Employment Opportunity Commission. 1978 Reorg. Plan No. 1, 43 Fed. Reg. 19807, issued pursuant to Reorganization Act of 1977, 5 U.S.C. §901. Thereafter, the commission system of Detroit Health was investigated by the Detroit District Office of the EEOC. The Agency reviewed the program in detail, examined records and interviewed witnesses. After full investigation under the Equal Pay Act, the EEOC ruled that "no reasonable cause exists to believe a violation has been committed." (Def. Ex. 8, 9, 10, 11, 12).

The holding of the Sixth Circuit in the instant case squarely contradicts the finding of the agency now entrusted with enforcement of the Equal Pay Act. While the holding of the EEOC is not binding on the courts, great deference should be given to the determination of the administrative agency charged with enforcing the legislative intent of a remedial statute. *Griggs* v *Duke Power Co.*, 401 U.S. 424 (1971). Since the EEOC is the agency entrusted by the legislative and executive branches to administer essentially all federal anti-discrimination laws and can be presumed to be most sensitive to the broad remedial purposes of the Equal Pay Act, Petitioners respectfully suggest that the EEOC would have reached a different conclusion in its investigation of Detroit Health's commission system were that conclusion necessary to eradicate the evils addressed by the Equal Pay Act. It did not do so but rather, after full investigation, approved Detroit Health's commission system.

C. The Decision of the Sixth Circuit Involves an Important Question of Federal Law Which Has Not Been But Should Be Settled by This Court.

Each year in the 1980's as women make up an increasingly larger proportion of the nation's workforce, the issues addressed by the Equal Pay Act become increasingly important to the economy and to the nation at large. The issue in this case involves the proper interpretation and application of the "factor other than sex" exception to the Equal Pay Act and affects potentially thousands of employers and hundreds of thousands of male and female employees.

The difficulties encountered by the federal trial courts and courts of appeals in interpreting and applying the exception are illustrated by this case as well as other recent decisions of courts of appeals. See, *e.g.*, *Hein* v *Oregon College of Ed.*, Case No. 82-3491 (9th Cir. 1983) (remanded for further analysis of the "factor other than sex" exception); *Plemer* v *Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983) (remanded for an examination of evidence rebutting

the "factor other than sex" defense); *Goodrich* v *Int'l Brotherhood of Elec. Workers*, 712 F.2d 1488 (D.C. Cir. 1983) (summary judgment for defendant on the basis of the "factor other than sex" defense reversed and case remanded because the trial court "applied the Act's residuary affirmative defense incautiously and disposed of the case precipitously").

The Court below stated at p. 11 of its Slip Opinion, "Few courts have addressed this problem explicitly." Similarly, see *Kouba* v *Allstate Ins. Co.*, *supra*, where the Court said, "We have found no authority giving guidance on the proper judicial inquiry absent direct evidence of discriminatory intent." 691 F.2d at 876.

Because of the importance of this question of federal law and because of the near absence of decisional authority to guide employers and the courts in its resolution, the question should be settled by the Supreme Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Dated: December 16, 1983
Detroit, Michigan

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APPENDIX

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July 11, 1983 Opinion of U.S. Court of Appeals for the Sixth Circuit.

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 81-1632

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DENISE BENCE, ET AL., *Plaintiffs-Appellants,* v. DETROIT HEALTH CORPORATION, ET AL., *Defendants-Appellees.*	ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed July 11, 1983

Before ENGEL, Circuit Judge, WEICK, Senior Circuit Judge, and BALLANTINE, U. S. District Judge.*

WEICK, Senior Circuit Judge, delivered the opinion of the Court, in which BALLENTINE, District Judge joined. ENGEL, Circuit Judge, (pp. 14-19) filed a separate opinion, dissenting in part and concurring in part.

WEICK, Senior Circuit Judge. Plaintiffs-Appellants Denise Bence, et al., have appealed to this court from a judgment in the United States District Court for the Eastern District of Michigan, Southern Division, in favor of their employer, De-

* The Honorable Thomas A. Ballantine, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

troit Health Corporation, defendant-appellee in their action, asserting a claim for violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1). Jurisdiction was based on 28 U.S.C. § 1331. For the reasons hereinafter stated, we reverse.

Plaintiffs-Appellants ("employees") are former employees of Detroit Health Corporation ("employer"). At all relevant times employer operated a chain of health spas, each of which was divided into a men's division and a women's division which operated on alternate days. Men operated the men's division and women operated the women's division. Employer's managers and assistant managers were paid, except for a six month period in 1975, by commissions based on gross sales of memberships. Male managers were paid 7.5% of the individual spa's gross sales of memberships to men. Female managers were paid 5% of gross sales of memberships to women. Male assistant managers received 4.5% of gross sales to men. Female assistant managers received 3% of gross sales to women.

Over the course of employer's life, the gross volume of membership sales to women was 50% higher than the gross volume of membership sales to men.[1] There was no difference in the job descriptions of male and female managers or assistant managers and they performed their jobs under similar working conditions. The total remuneration received by males and females was substantially equal although the females made more sales than the males.

Employees filed suit, contending that the different commission rates violated 29 U.S.C. § 206(d)(1), which provides:

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[1] For reasons not relevant to this case, this ratio changed during the last six months of 1975 so that the number of memberships sold to men and women were equal. During that time male managers received a salary of $1,000 per month plus 3% of gross sales of memberships to men, female managers received a salary of $1,000 per month plus 2% of gross sales of memberships to women, male assistant managers received a salary of $600 per month plus 1.5% of gross sales of memberships to men, and female assistant managers received a salary of $600 per month plus 1% of gross sales of memberships to women (Appendix 283).

> No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to the employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any other factor other than sex [.]

The employer contended that it did not violate this section because it paid different commission rates so that men and women would be paid substantially equal compensation for equal work performed.

The district court found the differential in commission rates established a prima facie case of wage discrimination and shifted to employer the burden to justify the differential. After analyzing the meaning of "wages" and "wage rate", the court found that § 206(d) focuses on equal wage rates and rejected employer's argument that the differential was justified because total remuneration was substantially equal. The court found, however, that "it is easier to sell memberships to women than to men" and that this brings employer within exception (iv) to § 206(d). The district court granted summary judgment for employer and employees appealed. This court held that material issues of fact existed with respect to the claim of justification and summary judgment improperly resolved a disputed issue of material fact, and remanded for further findings of fact and conclusions of law.

Upon remand, the district court conducted a bench trial at which the parties agreed that employees established their

prima facie case and directed proofs toward employer's defense. The district court found:

> [D]efendants are engaged in a business in which there are more potential female customers than male and in which history has demonstrated conclusively that the membership breakdown will be sixty percent female and forty percent male. In short, defendants have shown by a preponderance of the evidence that a male manager and a female manager, sitting at the same desk in the same spa and expending the same amount of effort, under totally equal conditions, will have a net sales result of six membership sales to females and four membership sales to men. This is not to suggest that on a one-to-one basis a sale to a potential woman customer is any easier than a sale to a male customer. To the degree that this court's opinion on the summary judgment motion referenced easier sales to women, it was not intended to be a qualitative analysis but a quantitative one. There are simply more potential female customers in a consistent ratio of 60/40 and, with the same expenditure of effort, male and female managers will produce sales figures resulting in a 60/40 female/male membership. The net result of this is that, since the commission rates of seven and one-half percent for men and five percent for females are pegged to this same ratio, female and male managers at the same location will make, for all practical purposes, the same salary. To the degree that there are differentials, as many times as not the female manager will make more money than her male counterpart. The defendants have thus, based upon figures that have been conclusively proved to be historically accurate, seized upon a system for equalizing pay rather than having established a system which is discriminatory in a manner violative of the Equal Pay Act. It is understandable that a woman manager would feel that she has an argument for making more money than her male counterpart. This would be true if the commission system were thrown out and managers were paid identical salaries. Undoubtedly, the female

> managers would point to the fact that they are generating more memberships than their male counterparts as an argument in support of a larger salary. The Equal Pay Act, however, only commands equal pay for equal work. It does not command an employer to give absolute numerical recognition to the balance-sheet significance of the equal work efforts of male and female employees.
>
> (Appendix 19-20)

The court concluded that employer's commission system was protected by exception (iii) and/or (iv) to § 206(d) and entered judgment accordingly.

I.

Employees appeal from the foregoing judgment. Both parties advance the same arguments they presented to the district court. Employer admitted at oral argument that there was no difference between the memberships its employees sold to men and women. In this posture, this case presents two issues: (1) whether employer did not violate § 206(d)(1) because its commission differential provided male and female employees with substantially equal total remuneration; (2) whether employer's commission differential is protected by one or more of the four exceptions to § 206(d)(1).

Employer's "equal total remuneration" argument fails. Inequality of pay is an element of an equal pay plaintiff's prima facie case. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974); *see generally* Sullivan, The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case, 31 *Ark. L. Rev.* 545, 547-83 (1978). Employer conceded, and the district court properly found, that employees established their prima facie case. Section 206(d)(1) comands an equal *rate* of pay for equal work. Comparison of pay rates entails measuring the amount of pay against a common denominator, typical-

ly a given time period or quantity or quality of output.[2] Consequently, it is necessary to identify the proper factor by which to measure rate of pay. This must be a practical inquiry which looks to the nature of the services for which an employer in fact compensates an employee.

Under certain circumstances, there might be merit in employer's "equal total remuneration" argument if it paid its employees on the basis of hours spent in its health clubs or for satisfactory performance of a host of specified duties, of which selling memberships was merely one element. Under such a system, total compensation would be based on total service to employer's clientele. This could entail equal "skill, effort, and . . . responsibility" despite the fact that female employees work harder selling memberships because potential female health club members outnumber potential male members.

That is not the case here. The record contains some evidence to support the conclusion that employees were more than glorified membership sellers. The job description for Manager and Assistant Manager stated that they were "completely responsible for the entire job operation," including personnel and bookkeeping functions (Appendix 260). They were also responsible for the duties of Instructors and Assistant Manager Trainees, who kept records, instructed and assisted spa members, and supervised cleaning personnel (Appendix 257-59).

There is far more evidence that employees' primary function was to sell memberships. Employer's job description stated that the progress and compensation of all its employees was "controlled by [their] 'PRODUCTION'," meaning "sales effectiveness" (Appendix 257). The specific job description for each grade of employee focused heavily on sales (Appendix

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[2] The Wage and Hour Division of the Department of Labor considers the term wage "rate" used in § 206(d)(1) to encompass "all rates of wages whether calculated on a time, piece, job, incentive or other basis." 29 C.F.R. § 800.111 (1982).

257-60). The record contains uncontradicted testimony that employer routinely fired managers who failed to meet its sales "goals" (Appendix 230-31). This evidence led the district court to find:

> [T]he life blood of the spa industry is the continued sale of memberships. It is for this reason that managers are compensated entirely on a commission basis. Although managers do have supervisory responsibilities for their spa employees, it is clear that they are instructed and fully realize that their primary responsibility is for the continued sale of memberships. Top management closely monitors the sale efforts of each spa location and, in the event that there is any significant statistical departure from what history has demonstrated should be the sales results, it is a red flag to management that something is amiss at that particular location.

(Appendix 20). This court accepts this finding and concludes that employees were paid solely on the basis of memberships sold rather than overall service rendered to employer.

Evaluation of employer's compensation on a "per sale" basis makes it apparent that it paid female managerial personnel at a lower rate than their male counterparts. This is precisely what the Equal Pay Act forbids.[3] Since employer does not otherwise contest employee's prima facie case, it can escape liability only if its discriminatory commission system is protected by one or more of the four exceptions to § 206(d)(1).

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[3] Employer's reliance on *Bullock* v. *Pizza Hut, Inc.*, 429 F. Supp. 424 (M.D. La. 1977), is misplaced. In that case, the court found the defendant unlawfully discriminated against a female restaurant manager by paying her a lower base salary than males received, even though her salary plus bonus was equal to or greater than that paid to male managers. The court rejected a challenge to the defendant's bonus system because it was based solely on profit and loss statements; it did not hold that equal total remuneration precludes an Equal Pay Act violation.

II.

Sexually discriminatory compensation does not violate § 206(d)(1) if "payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex [.]" The district court concluded that employer's wage differential was justified under exception (iii) because earnings were tied to membership sales, or under (iv) because a difference in the size of the markets for male and female health club members is a "factor other than sex" within the meaning of the Equal Pay Act. We disagree.

A.

The following general principles govern application of the exceptions to § 206(d)(1). The Equal Pay Act was intended as a "broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it." *Shultz* v. *American Can Company — Dixie Products*, 424 F. 2d 356, 360 (8th Cir. 1970). The Act should be construed and applied to achieve this broad remedial purpose. *Corning Glass Works* v. *Brennan, supra*, at 208. Courts should not sanction practices which "would frustrate, not serve, Congress' ends." *Id.*

Exceptions (i) through (iii) are specific examples illustrating the "broad principle" set forth in exception (iv). *County of Washington* v. *Gunther*, 452 U.S. 161, 170-71 n. 11 (1981). All four exceptions are affirmative defenses which, in essence, "authorize" an employer to differentiate in pay between sexes. *Id.*, at 169. Once a plaintiff establishes a prima facie case under § 206(d)(1), the burden shifts to the employer to prove by a preponderance of the evidence that its compensation system is justified by one or more of the four exceptions. *Corning*

Glass Works v. *Brennan, supra,* at 196-97. This burden is a "heavy one." *Equal Emp. Opportunity Com'n* v. *Whitin Machine Works, Inc.*, 635 F. 2d 1095, 1098 (4th Cir. 1980); *Brennan* v. *Owensboro – Daviess County Hospital*, 523 F. 2d 1013, 1031 (6th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976). An employer cannot avail itself of any of the exceptions to § 206(d)(1) unless it proves that "the factor of sex provides no part of the basis for the wage differential." *Id.*, at 1031, *citing* 29 C.F.R. § 800.142 (1974).

B.

We think it plain that employer's compensation system is not protected by exception (iii), which exempts "a system which measures earnings by quantity or quality of production." The "quantity" test refers to equal dollar per unit compensation rates. There is no discrimination if two employees receive the same pay rate, but one receives more total compensation because he or she produces more. In the instant case, women had to produce more to be paid the same as men. The "quality" test is not met because it was not easier to sell memberships to women than to men, and there was no difference between the memberships employer offered to men and women. Any other result would undermine the purpose of the Equal Pay Act by allowing employers to pay women lower incentive rates than men for the same work.

C.

A troublesome aspect in this case is whether employer's commission differential is a "factor other than sex" within the meaning of exception (iv). The issue is whether the phrase "any other factor other than sex" means literally *any* other factor, a factor traditionally used in job evaluation systems, or something else. The legislative history of the Equal Pay Act suggests Congress intended exception (iv) to include factors other than traditional job evaluation criteria. Referring

to § 206(d)(1)(i) through (iv), the committee report on an Equal Pay Act percursor (H.R. 6060) stated:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

H. R. Rep. 309, 88th Cong., 1st Sess. 3, *reprinted in* Staff of House Comm. on Education & Labor, Legislative History of the Equal Pay Act of 1963, 88th Cong., 1st Sess. 44 (1963). During debate in the House, Rep. Griffin observed:

> I should like to focus the attention of the gentlemen upon small roman numeral iv . . . which makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation. In other words, even though jobs involve the same skill, equal effort, equal responsibility, and are performed under the same working conditions, if there is any other factor not based on sex upon which a differential is based, then no violation of this law can be found. Roman numeral iv is a broad principle, and those preceding

> it are really examples: such factors as a seniority system, a merit system, or a system which measures earnings on the basis of quality or quantity of production. The other body saw fit to leave out references in the bill to a merit system, a system which measures earnings on the basis of quality, and quantity, and a seniority system, and included only the broad language found in roman numeral iv of our bill. However, it should be clear that under either bill a wage differential based upon any factor other than sex is not a violation.

109 Cong. Rec. 9203 (1963). *See also* 109 Cong. Rec. 9198 (1963) (remarks of Rep. Thompson); *Id.* 9206 (remarks of Rep. Goodell).

Few courts have addressed this problem explicitly. Employer relies on *Hodgson* v. *Robert Hall Clothes, Inc.*, 473 F. 2d 589 (3d Cir.), *cert. denied*, 414 U.S. 866 (1973), for the proposition that exception (iv) is not restricted to factors traditionally included in job-evaluation systems, but encompasses any non-sexual factor pertinent to an employer's business judgment on how to run its business. In that case, an employer maintained separate men's and women's clothing departments staffed by salesmen and saleswomen respectively. The men's department produced more profit than the women's department because men's clothing was more expensive and had a higher markup than women's clothing. The employer contended that intimate contact between sales clerks and customers made it necessary to segregate male and female clerks, and that higher profit in the men's department justified its practice of paying higher incentive wages to salesmen than to saleswomen. Based on the foregoing legislative history, the court agreed on both counts. The holding of *Robert Hall* is that "economic benefit" may be a "factor other than sex" within the meaning of exception (iv). Read broadly, *Robert Hall* may stand for the proposition that any non-sexual factor based on an employer's legitimate business judgment may be a "factor other than sex" within the meaning of exception (iv).

In *County of Washington* v. *Gunther, supra,* at 170-71 n. 11, the Supreme Court observed that Congress added exception (iv) "because of a concern that bona fide job evalution systems used by American businesses would otherwise be disrupted" by the Equal Pay Act. Two courts have interpreted this as limiting exception (iv) to factors traditionally included in job-evaluation schemes. *Schulte* v. *Wilson Industries, Inc.,* 547 F. Supp. 324, 339 n. 16 (S. D. Tex. 1982); *Kouba* v. *Allstate Insurance Co.,* 523 F. Supp. 148, 161 (E. D. Cal. 1981), *rev'd,* 691 F. 2d 873 (9th Cir. 1982). In *Kouba,* the Ninth Circuit rejected this conclusion and adopted the *Robert Hall* "legitimate business reason" test for the scope of exception (iv). *Id.,* at 867-77.

In the instant case, employer seeks to bring itself within the *Robert Hall* rule. It argues that a legitimate business policy of providing male and female employees equal total remuneration justifies a commission differential because the market for women's memberships is larger than the market for men's memberships. Employer cannot avail itself of the *Robert Hall* "economic benefit" rule because women managers provided *more* profit than their male counterparts, not less. *Equal Emp. Opportunity Com'n* v. *Hay Associates,* 545 F. Supp. 1064, 1084 (E. D. Pa. 1982). Moreover, unlike *Robert Hall,* in the instant case there is no difference between the product sold by male and female employees.

We do not deem it necessary to decide whether a difference in the size of markets for men's and women's memberships alone justifies employer's commission differential. Without passing on the propriety of segregating male and female employees into men's and women's departments, we believe that such segregation *plus* application of a lower commission rate *only* to those who sold memberships to women effectively locked female employees, and only female employees, into an inferior position regardless of their effort or

productivity.[4] Since the lower commission rate could apply only to women, we do not believe employer has proved that "sex provided no part of the basis for the wage differential." *Brennan* v. *Owensboro – Daviess County Hospital, supra,* at 1031. *Cf.* 29 C.F.R. § 800.116(e) (1982) (commission differential between departments acceptable if potentially applicable to men and women).

Today's holding is a narrow one. We do not hold that an employer may not under any circumstances segregate male and female employees into separate departments and pay them different rates of wages. Nor do we endorse or reject the broad reading of § 206(d)(1)(iv) set forth in *Robert Hall* and *Kouba*. Those are questions for another day. We hold only that an employer may not avail itself of the affirmative defense under § 206(d)(1)(iv) where it compensates male and female employees solely for selling the exact same product, only female employees can be compensated at a lower commission rate, and the differential is not justified by any difference in economic benefit to the employer. Under the facts of this case, this result is necessary to effectuate the broad remedial purpose of the Equal Pay Act.

Accordingly, the judgment below is reversed and this case is remanded to the district court for further proceedings in conformity with this opinion.

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[4] Maintenance of a commission differential when the traditional 60/40 ratio of membership sales to women and men broke down in 1975 renders suspect employer's claimed goal of compensating its male and female managerial employees equally. This fact alone may not prove employer had an evil motive, but it does undermine the contention that the commission differential was designed solely to offset the 60/40 sales ratio.

ENGEL, Circuit Judge, dissenting in part and concurring in part.

I agree with the majority that the compensation system here does not come within exception (iii) of the Equal Pay Act ("the Act"), which exempts "a system which measures earnings by quantity or quality of production." 29 U.S.C. § 206(d)(1)(iii). To the extent the trial court relied upon this exception, it was in error. Further, the parties stipulated before trial that the sole remaining issue to be decided was the application of exception (iv), relating to "a differential based on any other factor than sex." 29 U.S.C. § 206(d)(1)(iv). I also agree with the majority's conclusion that the employer's "equal total remuneration argument" must fail. A deliberate differential in commission rate according to sex cannot be justified by a desire to equalize remuneration between the sexes although, as the majority points out, there could conceivably be some circumstances, not present here, in which such a result would not offend the Equal Pay Act. Since the trial court placed primary reliance upon this theory, it follows that the judgment based thereon must be vacated.

If the different commission rates paid by Detroit Health are based on the sex of the employee, they are in violation of the Act. If, however, the different commission rates paid by Detroit Health are based upon the sex of the health club member, this could quite readily be a "factor other than sex" under the Act, for the Act speaks to the sex of the employee and not to the sex of the customer.

Stipulation 16, entered into between the parties and hence binding upon the trial court and us, provides:

> 16. At all material times, the volume of gross sales to females was consistently higher than gross sales to males, for the spas of Detroit Health. While there are variances from month to month, when measured over representative periods of time, the ratio of gross sales to females to gross sales to males is 60/40.

In other words, there is solid evidence here that the market for men's memberships is distinctly different from that for women's memberships. As noted by the majority opinion and the trial judge, health spas generally, and those operated by Detroit Health Corporation in particular, attract about 50% more female customers than male customers. This disparity in business is bound to affect the operation of a health club business in a number of ways, and could quite easily evoke different economic responses. The difference in the markets for male and female memberships could be regarded as a factor "other . . . than sex" under exception (iv) of the Act.

Differences in the profitability of men's and women's divisions were held to justify differing commission rates for male and female salespersons in *Hodgson* v. *Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir.), *cert. denied*, 414 U.S. 866 (1973). *Robert Hall* would be more appropriately applied here, of course, if the female employees' rate were *higher* than the male employees' rate. Paying a higher commission rate for sales to men than for sales to women could, however, be justified by the market generally and by other economic and business considerations. Commission rates normally vary according to the type of market in which products or services are sold. If there were no sex discrimination in the selection of salespersons, different commission rates for women's applications, men's applications, or for applications of children, handicapped persons, golden agers, or veterans would be acceptable. Normally, employers pay commissions at a rate which they perceive will provide sufficient incentive to their sales staff and also provide enough income to retain sales personnel in their positions. If both male and female employees acted as managers or assistant managers on any given day without regard to the sex of the customers, there might be some grumbling at the different rates based upon this factor, but there would be no violation of the Equal Pay Act.

The trouble with such an analysis here is two-fold. Stipulation 3, also entered into between the parties, provides:

3. Detroit Health owns and operates a chain of health spas. Operationally, each spa is divided into a male division and a female division, with one division operating the spa on Monday, Wednesday and Friday and the other on Tuesday, Thursday and Saturday. (The determination of which division operates on which set of days varies from spa to spa.) The male division is operated by male managerial personnel and male instructors, attracting and servicing male members and guests. Conversely, the female division is operated by female managerial personnel and female instructors, attracting and servicing female members and guests.[1]

[1] There is no allegation that the use of exclusively males to attract and service males and exclusively females to attract and service females is in any way unlawful.

Therefore, the most obvious discrimination between male and female employees – that reflected in footnote 1 of Stipulation 3 – was deliberately not complained of in this case; in fact, the parties expressly agreed that this discrimination was not unlawful. It is this circumstance which makes this case so difficult to analyze properly. The second difficulty is that the record contains evidence that the commission rates employed here were based not upon the sex of the customer but were in fact based upon the sex of the employee.

The principal witness for the company was James P. Hoppin, vice-president of Detroit Health Corporation since 1974. Mr. Hoppin was questioned at trial concerning the commission rate paid for walk-ins of one sex who purchase memberships from a manager or assistant manager of the other sex:

THE COURT: How are walk-ins handled on those days? Somebody not being aware of the fact that that day is allocated, and just wants to walk in and join, perhaps they have seen one of your ads, how is a female walk-in handled on a male day and a male walk-in handled on a female day?

THE WITNESS: A couple of different ways. First of all, they could make an appointment for the next day. If they are there specifically to buy a membership, they would do that. There is an appointment book there for that.

THE COURT: If a male manager sold a female membership, does he get credit for it?

THE WITNESS: We would split the dial [sic, deal], which means he would get half for writing it and it would be left for the ladies the next day, and they would get half of it.

THE COURT: So that commission then would be divided among the parties?

THE WITNESS: That's right.

• • •

REDIRECT EXAMINATION

BY MR. CARROLL:

Q Do these walk-ins comprise a significant part of your sales activity?

A Absolutely not.

• • •

RECROSS-EXAMINATION

BY MR. RADABAUGH:

Q Mr. Hoppin, I am trying to understand that in terms of the commission system. If you have a walk-in on a woman's day, the walk-in is a male, and the women sells the male a membership, essentially enrolls him in your health spa –

A (Interposing.) Yes?

Q (Continuing) – what happens to the commission?

A It's split in half.

Q O.K. And in terms of being split in half, what commission rate are you splitting in half?

A We are splitting the gross in half.

Q So that if a membership costs $4 hundred, you would credit $2 hundred of the $4 hundred to the male division and $2 hundred to the female division, and then you would apply the respective percentage rates to the $2 hundred?

A That is correct.

Q So if a woman sold – enrolled a man on a woman's day, that women would get, if she was a manager, 5-percent of $2 hundred, is that correct?

A Under your example, correct.

Q Is that $10?

A That is correct.

Q And using the same application, the male manager, under my analogy, would get $15; is that correct?

A That is correct.

Q Now, reversing that example, if a woman came in and enrolled herself as a member on a male day, would there be a reverse situation?

A It would be treated the same way; the commission would be split.

Q The application of the system would be the same, is that correct.

A That is correct.

The record contains similar testimony from employees. Such testimony does not appear to have been weighed by the trial judge. In my opinion, it could compel a conclusion that the different commission rates paid by Detroit Health Corporation are violative of the Equal Pay Act because they are based on

the sex of the employee and not upon the sex of the customer. The only aspect of this case which makes me hesitate is the testimony of Mr. Hoppin that such sales – *i.e.*, to walk-ins – "absolutely [do] not" comprise a significant part of the business. If, therefore, such evidence is *de minimis*, the trial judge might have justifiably relied upon other evidence in the record which he found more persuasive. Because this is essentially a matter of weighing the evidence and applying the appropriate law, I would remand for reconsideration of the evidence by the trial judge in light of the concerns expressed in these opinions.

September 14, 1979 Opinion of U.S. District Court for the Eastern District of Michigan.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENISE BENCE, SHIRLEY STAN, KAY GROBBEL (a/k/a Kay Harrington), TEDDI REARDON, SHERRY PRINGHAM, JOANE GAMBINO and CINDY VEZINAU,
Plaintiffs,

vs. CIVIL NO. 7-70256

DETROIT HEALTH CORPORATION, a Michigan corporation, WILLIAM F. HUBNER, NORMA FERRARI, GLENN BARTH, HANS KUEHNE, JAMES HOPPIN and SAUL BECHEK, jointly and severally,
Defendants.

OPINION

This matter comes before the court on the parties' cross motions for partial summary judgment and raises the issue whether defendant's method for remunerating its employees violates the applicable provisions of the Equal Pay Act, 29 U.S.C. § 206(d). Plaintiffs assert that defendant's compensation system violates the Act because it uses a lower commission percentage rate to calculate the earnings of managerial personnel in the company's women's division. Defendant, on the other hand, argues that its system withstands scrutiny under the Equal Pay Act because, notwithstanding a differential in commission percentages, the total earnings of female managerial personnel substantially equal the earnings of their male counterparts.

September 14, 1979 Opinion of U.S. District Court for the Eastern District of Michigan.

In addition to filing motions and briefs, the parties have also submitted a list of stipulated facts. The court notes that these stipulations obviate the need for a trial on this issue. Since only a disputed issue of law remains, the matter is ripe for summary judgment. F.R.C.P. 56(c). The court also notes that this case raises an issue of first impression in this circuit.

Defendant Detroit Health Corporation owns and operates a chain of health spas each of which it divides into a men's division and a women's division, with one division operating a spa on Monday, Wednesday, and Friday and the other on Tuesday, Thursday, and Saturday. The determination of which division operates on which days varies from spa to spa. Male managerial personnel and instructors operate the men's division and are primarily responsible for attracting and servicing male members and guests. Conversely, female managerial personnel and instructors similarly operate the women's division.[1]

The employees in each division consist generally of a manager, an assistant maanger, in some cases an assistant manager-trainee, and instructors. Defendant Detroit Health pays its instructors and assistant manager-trainees a salary; whereas, at all times material to this matter, except for June, 1975 to January 1, 1976, it compensates its managers and assistant managers exclusively on a commission basis. Plaintiffs are women whom defendant employs as either managers or assistant managers for one of its spas. They allege discrimination in compensation on the basis of sex. Specifically, they contend, *inter alia*, that they received lower commission rates than those for men, in violation of the Equal Pay Act, *supra*.[2]

[1] There is no allegation that this segregated employment is unlawful.

[2] In addition to the claim grounded on the Equal Pay Act, the complaint alleges causes of action under various applicable federal and state provisions. As previously noted, the parties agree that the claim at issue can be decided as a matter of law, and also that the court's decision on this issue will greatly facilitate a resolution of the entire dispute.

September 14, 1979 Opinion of U.S. District Court for the Eastern District of Michigan.

Defendant's method of compensation pays male managers 7.5 percent of an individual spa's gross sales to males. Female managers receive 5 percent of the spa's gross sales to females. Male assistant managers receive 4.5 percent of a spa's gross sales to males; and female assistant managers are paid 3 percent of a spa's gross sales to females. Defendant Detroit Health altered this pure commission system during the period that extended from June, 1975 to January 1, 1976, because of a drop in business sales. Under the altered method of compensation, a male manager of a spa was paid $1,000 per month plus 3 percent of that spa's gross sales to males. A female manager received $1,000 per month plus 2 percent of an individual spa's gross sales to females. Male assistant managers received $600 per month plus 1.5 percent of that spa's gross sales to men; and female assistant managers were paid $600 per month plus one percent of the spa's gross sales to women.

The parties stipulate that defendant Detroit Health predicates its differential in commission rates on the volume of gross sales to female members and guests compared to gross sales to males, which has historically and consistently been 60 percent female and 40 percent male; although there are variances from month to month. Defendant Detroit Health implements this 60/40 ratio in its commission percentage to reflect and balance this recognized differential in gross sales. Absent that differential, defendant asserts male managerial employees would consistently earn less than similarly situated females. But when the 60/40 ratio of commission percentages is applied to the converse 60/40 ratio of gross sales, the earning potential of all managers tends to level off and their actual earnings are substantially equal when measured over a fixed period of time.

At this juncture, agreement between the parties ends. Plaintiffs direct this court's attention to defendant's commission rates which they assert violate the generally recognized princple that, absent justification, wage differentials

are legal only if they compensate for appreciable variations in skill, effort or responsibility, or if the jobs are not performed under similar working conditions. *See, Laffey* v. *Northwest Airlines*, 13 F.E.P. Cases 1078 (D.C. Cir. 1976). Defendant, meanwhile, urges this court to focus on the total remuneration that male and female commissioned employees receive at defendant Detroit Health which is substantially equal and to determine that no illegal wage differential exists under defendant's pay structure. In resolving this dispute, the court looks to 29 U.S.C. § 206(d), as well as to the extensive series of regulations which the Department of Labor has promulgated and which are entitled to "great deference" by the courts in applying the Equal Pay Act to given factual situations. *See, Breenan* v. *City Stores, Inc.*, 479 F.2d 235, 239-240 (5th Cir. 1973).

Title 29, United States Code, Section 206(d)(1) provides:

> No employer having employees subject to any provisions of this Section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to the employees in such establishment at a rate less than the rate at which he paid wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex[.]

In order to make out a prima facie case under § 206(d)(1), the plaintiff has the burden of proving two things: first, that the employer pays a different rate of wages to employees of the opposite sex (i.e., that there is a "wage differential"), and second, that the different payment is for

equal work. Once a prima facie case has been made out by the plaintiff, the burden of proof shifts to the defendant who must justify his compensation scheme as being within one of the listed exceptions to the statute. *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1973).

The parties have agreed that the work performed by the female and male managers is equal in skill, effort and responsibility and is performed under similar working conditions. The jobs need not necessarily be identical, as long as they are substantially equal. This can be present even where, as here, the job makes it impractical for both sexes to work interchangeably. *Hodgson* v. *Robert Hall Clothes, Inc.*, 326 F. Supp. 1264 (D. Del. 1971), *aff'd in part and rev'd. in part*, 473 F.2d 589 (3rd Cir. 1973).

The issue before the court with respect to plaintiffs' prima facie case is whether there is an equal rate of payment to men and women. This requires the court to construe the critical words in § 206(d)(1) and thus determine the means by which "equal pay" must be viewed.

The critical terms in § 206(d) (1) in deciding the meaning of equal pay are "wages" and "rate." In this regard, the regulations promulgated by the Department of Labor comment on both words. Title 29, C.F.R. § 800.110 provides in pertinent part that "wages . . . generally include all payments made to or on behalf of the employee as remuneration for employment." Section 800.113 adds that

> the wages to be considered in determining compliance with the equal pay provisions include, in addition to such . . . sums paid as weekly, monthly or annual salaries; . . . commissions, bonuses or other payments measured by production, efficiency, attendance, or other job-related factors, or agreed to be paid under the employment contract.

In the present case, "wages" would clearly include all commissions paid to the managerial employees at all times as well as the flat monthly salaries received during the period from June, 1975 to January 1, 1976.

Likewise, § 800.111 provides in pertinent part that wage "rate" includes "all rates of wages whether calculated on a time, piece, job, incentive or other basis." Here, the wage rate from June, 1975 to January 1, 1976 for female managers was $1,000 per month, calculated on a time basis ($600 per month for assistants), plus 2 percent of the gross receipts from sales of memberships to women at the given spa, calculated on incentive or piece basis (one percent for assistants). The wage rate during that period for male managers was $1,000 per month ($600 for assistant managers), plus 3 percent of the gross receipts from sales of memberships to men at a given spa (1.5 percent for assistants). At all other relevant times, the wage rate was calculated solely on an incentive or piece basis: male managers receiving 7.5 percent of the gross sales of memberships to men (4.5 percent for male assistants), and female managers receiving 5 percent of gross sales to women (female assistants receiving 3 percent).

It is clear from the statute and regulations that the meaning of wage "rate" differs from "wages." Here, although the "wages" paid to the women are admitted to be substantially equal, the "rate" of payment of wages from commissions is consistently one and one-half times greater for men than for women. Defendant Detroit Health argues that this is required in order to give the men an opportunity to earn as much as the women do. This is so, he asserts, because of the nature of the business which, over the past twenty years, has consistently attracted one and one-half times more women than men. Although the court finds this argument to have significant relevance, it also finds that such assertions are more properly raised and discussed as matters of affirmative defense. The statute focuses its gen-

eral prohibition on the rate of payment rather than the total amount of wages paid. There is nothing in the case law examined by this court which would indicate that rate of payment is equivalent to the total amount of remuneration received.

The court finds that the wage rate paid to women on the commission basis is unequal to that which is paid to men for substantially the same work and that the plaintiffs have therefore established a prima facie case of a violation of § 206(d)(1) against defendant Detroit Health. Whether the nature of defendant's business can justify that differential is a separate question which will now be considered. For the following reasons, the court holds that such a defense has been established as a matter of law.

Although it is found that an employer pays a wage rate to women which is less than that paid to men for equal work, there is no violation of the Equal Pay Act if such payment is pursuant to "(iv) a differential based on any other factor other than sex." This requirement has generally been interpretated to mean that sex can provide no part for the basis of the wage rate differential. 29 C.F.R. § 800.142; *Hodgson* v. *Robert Hall Clothes, Inc., supra.*

The defendant's system of compensation in paying lower commission rates to women than to men is based upon the nature of its business. According to company history, the volume of sales to women is higher than to men, meaning that it is relatively easier to sell spa memberships to the women. In arriving at the determination that these are factors other than sex so as to adequately justify defendant's method of compensating women at a lower rate under the Equal Pay Act, the court relies upon *Hodgson* v. *Robert Hall Clothes, Inc., supra,* which has been cited to the court by both parties. A relatively close examination of the facts and reasoning in that case is helpful to an understanding of the proper resolution of the matter at hand.

The Robert Hall clothing stores are divided into the men's and boys' department, which employ only male salespersons, and the ladies' and girls' department, which hires only women. The base salaries (at a per hour rate of compensation) for full and part-time salesmen are consistently higher than those for their female counterparts. Incentive compensation is also paid, the rate of which varies from item to item and depends upon factors such as need to sell the item, markup, profitability to the store, ease of selling the item, and selling price. More high priced merchandise is carried in the men's department and those items remain in the store longer than the women's merchandise. The net effect of the incentive system is that the ratio of incentive pay to gross sales is approximately .2 percent higher for men than for women.

It was established that the rates of wages paid to women as starting, progressive, and incentive compensation were lower than those paid to salesmen. The court also found that the work involved was substantially equal, so that a prima facie case of violation of § 206(d)(1) was made out against Robert Hall. The sales and amount of gross profits on the merchandise in the men's department, however, created "relatively greater benefits" to Robert Hall. The court accepted as a proper defense Robert Hall's assertion that the wage rate differential was based on economic considerations and was not based on the sex of the employees.

There are significant factual similarities in the *Robert Hall* case to the case at hand. First, employees in both the Robert Hall store and the Detroit Health spas are divided into departments on the basis of sex for legitimate reasons which are not disputed. Second, departments in both establishments are designed to service members of exclusively one sex. Third, there is a relatively higher rate of payment to men in both establishments.

Unlike *Robert Hall*, however, there is no greater profitability to Detroit Health on memberships sold to men. Detroit Health, therefore, cannot rely on an "economic benefit" to justify its compensation scheme. Rather, it is the nature of the business in which sales are consistently higher to women than to men which is sought to justify defendant's method of compensation. In this regard, the court refers to a part of the Department of Labor's Field Handbook which is cited by both the court of appeals in *Robert Hall* and by the plaintiffs in the present case. The handbook in pertinent part deals with when a differential in commission rates between members of the opposite sex can be justified, although both sexes perform the same work.

> Such a difference in commission rates might be based on many factors such as *sales volume*, markup, cost of the items sold, type of merchandise, and the *ease of selling merchandise in each particular department*. (Emphasis added).

Because of the nature of Detroit Health's business, it is easier to sell memberships to women than to men, and consequently, the volume of sales of women's memberships is higher. The court finds that these are factors other than sex which justify a lower rate of commission to women in this case. The court further finds that sex of the employees provided no part of the basis for the differential so as to violate the Act. As in *Robert Hall*, Detroit Health did not arbitrarily put males and females into the respective divisions. In this regard, the court of appeals in *Robert Hall* stated on page 596:

> Although the fact that the jobs in question require employment of one sex exclusively may not alone justify a wage differential, it does seem to be a factor that can be considered in evaluating the employer's justification for his differential.

Where, as here, the employees must be divided on the basis of sex in order to perform their jobs, a compensation plan which provides different rates of payment to the divisions will not be found to be based on the sex of the employees and therefore not within an exception.

Finally, in order to fall within the exception, not only must sex not be a factor in establishing the plan, but that showing "may sometimes be incomplete without a showing that there is a reasonable relationship between the amount of the differential and the weight properly attributable to the factor other than sex." 29 C.F.R. § 800.143. The amount of the wage rate differential here is stipulated to be correlated to the ratio of gross sales to females to gross sales to men when measured over representative times. Detroit Health asserts that this is done so that the wages paid to the men will be substantially equal to those paid to women for equal work. The court of appeals in *Robert Hall* reversed the district court's finding that the salaries must be correlated to individual performance, stating that to require correlation to individual performance would be too great a hardship. Rather, the statute allows reliance upon reasonable business judgments and it was found sufficient to rely on departmental figures. This court finds that defendant Detroit Health's correlation to average performance over the last twenty years is adequate to show a reasonable relationship between the rate of commission and the nature of the business which justifies a differential in wage rate between men and women.

On page six of their brief, plaintiffs admit:

> To avoid discrimination, the logical thing to do would have been to base the percentage on a combined male-female sales gross and pay both men and women managers the same percentage.

The court finds that this is the result that defendant's plan was designed to achieve, and that Detroit Health's

method of compensating its managerial employees does achieve this result within the permissible limits of the Equal Pay Act. It does not matter that it was not explained and implemented exactly as plaintiffs suggest.

Accordingly, partial summary judgment is granted in favor of defendants and plaintiffs' motion for partial summary judgment is denied. A judgment is being entered this date consistent with this Opinion. Said judgment is to be final pursuant to the provisions of Rule 54(b), the court specifically finding that there is no just reason for delay.

(s) RALPH B. GUY, JR.
United States District Judge

DATED: SEP 14 1979

September 14, 1979 Partial Summary Judgment for Defendant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENISE BENCE, SHIRLEY STAN, KAY GROBBEL (a/k/a Kay Harrington), TEDDI REARDON, SHERRY PRINGHAM, JOANE GAMBINO and CINDY VEZINAU,
Plaintiffs,

vs. CIVIL NO. 7-70256

DETROIT HEALTH CORPORATION, a Michigan corporation, WILLIAM F. HUBNER, NORMA FERRARI, GLENN BARTH, HANS KUEHNE, JAMES HOPPIN and SAUL BECHEK, jointly and severally,
Defendants.

PARTIAL SUMMARY JUDGMENT FOR DEFENDANT
(Entered September 14, 1979)

This matter having come before the court on the parties' cross motions for partial summary judgment, and the court having reviewed and fully considered the motions and supporting briefs and having determined that no oral argument is necessary;

IT IS ORDERED that Defendants' Motion for Partial Summary be GRANTED and Plaintiffs' Motion for Partial Summary Judgment be DENIED, in accordance with the court's Opinion attached hereto. This is to be deemed a final judgment pursuant to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, the court specifically finding there is no just reason for delay.

(s) RALPH B. GUY, JR.
United States District Judge

DATED: Sep 14 1979

April 14, 1981 Order of U.S. Court of Appeals for the Sixth Circuit.

NO. 79-1642
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENISE BENCE, SHIRLEY STAN, KAY GROBBEL (a/k/a KAY HARRINGTON), TEDDI REARDON, SHERRY PRINGHAM, JOANE GAMBINO and CINDY VEZINAU
Plaintiffs-Appellants

v.

DETROIT HEALTH CORPORATION, WILLIAM F. HUBNER, NORMA FERRARI, GLENN BARTH, HANS KUEHNE, JAMES HAPPIN and SAUL BECHEK, jointly and severally
Defendants-Appellees

ORDER
(FILED Apr 14 1981)

BEFORE: WEICK, LIVELY AND KENNEDY, Circuit Judges.

The plaintiffs appeal from summary judgment for the defendants entered in this action under the Equal Pay Act. After a stipulation was filed the parties made cross motions for summary judgment, The district court found that the plaintiffs had made a prima facie case of violation of the Act because female employees were paid at a lower rate than male employees for equal work on jobs requiring equal skill, effort and responsibility, performed under similar working conditions. The district court further found that the defendants had established justification for the lower rates of pay upon a showing that when these lower rates of pay were applied to a higher volume of business in the

branches of the enterprise serving women than in those serving men, a condition which had existed for a significant period of time, the total remuneration received by each group was approximately the same.

Upon consideration of the record on appeal together with the briefs and oral arguments of counsel the court concludes that the district court properly found that the plaintiffs had made a prima facie case of discrimination under the Equal Pay Act. However, the court further finds that material issues of fact existed with respect to the claim of justification put forward by the defendants and that summary judgment on this issue was improper. Upon remand the district court should conduct further proceedings on this issue and enter findings of fact and conclusions of law.

The judgment of the district court is vacated and the cause is remanded for further proceedings in accordance with this order.

ENTERED BY ORDER OF THE COURT

(s) Leonard Green
Clerk

September 11, 1981 Opinion of U.S. District Court for the Eastern District of Michigan.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENISE BENCE, SHIRLEY STAN, KAY GROBBEL (a/k/a KAY HARRINGTON), TEDDI REARDON, SHERRY PRINGHAM, JOANE GAMBINO and CINDY VEZINAU,
Plaintiffs,

vs. CIVIL NO. 7-70256

DETROIT HEALTH CORPORATION, WILLIAM F. HUBNER, NORMA FERRARI, GLENN BARTH, HANS KUEHNE, JAMES HAPPIN and SAUL BECHECK, jointly and severally,
Defendants.

OPINION
(Dated September 11, 1981)

Plaintiffs bring this action pursuant to the provisions of the Equal Pay Act, 29 U.S.C. § 206(d). The named plaintiffs are former managers of various of defendants' health spas. The claim under the Equal Pay Act is simple and straightforward. During the period of time in question, the plaintiffs, who were female health spa managers, were being compensated solely on a commission basis, which commission was computed at five percent of the gross sales of the women's division of the spa that they managed. Their male counterparts were compensated at a rate of seven and one-half percent of the gross sales of the men's division. There is no dispute that this differential existed but the defendant employer seeks to justify the differential pursuant to the provisions of the Equal Pay Act which would allow

such differentials if based upon a system which measures earnings by quantity or quality of production or is a differential based on any other factor than sex.

The court has now completed a bench trial on this issue. The matter was initially before the court in mid-1979 on the parties cross motions for summary judgment after they had entered into an extended stipulation of facts. Pursuant to the cross motions for summary judgment, this court decided the precise issue presented here in favor of the defendants and granted their motion for summary judgment and denied the plaintiffs' motion for summary judgment. A lengthy and detailed written opinion was filed indicating the court's reasons for granting summary judgment for the defendants.

Subsequent to the granting of summary judgment to the defendants, plaintiffs' appealed and the Sixth Circuit Court of Appeals, in a brief *per curiam* order, remanded this matter for further proceedings on April 23, 1981. The court of appeals held:

> Upon consideration of the record on appeal together with the briefs and oral arguments of counsel the court concludes that the district court properly found that the plaintiffs had made a prima facie case of discrimination under the Equal Pay Act. However, the court further finds that material issues of fact existed with respect to the claim of justification put forward by the defendants and that summary judgment on this issue was improper. Upon remand the district court should conduct further proceedings on this issue and enter findings of fact and conclusions of law.

Pursuant to the remand, this court has now held a full trial on this matter. The parties and the court agreed that, in light of this court's earlier findings and the action of the court of appeals, the plaintiffs would be deemed to have made out a prima facie case and that the trial would

proceed with the defendants going forward and producing their evidence in support of their justification for the admitted commission rate differential. Upon the conclusion of the submission of defendants' evidence, plaintiffs produced rebuttal evidence.

The testimony offered by defendants was primarily that of James Hoppin, the vice president of the defendant corporation and the individual who is charged with the majority of responsibility for the day-to-day operations of defendant corporation's health spas. Defendants also offered the deposition testimony of Jimmy Johnson, the executive director of the Association of Physical Fitness Centers, a trade association representing 480 full service physical centers throughout the United States. Most of the major health clubs and spas throughout the United States belong to this association.

The defendants' rebuttal case was built around the testimony of two of the named plaintiffs, Teddi Reardon and Denise Bence, along with testimony from Donald Radford, an employee of the Health and Tennis Corporation, a competitor of the defendant corporation.

The bulk of the twenty-one exhibits that were submitted consisted of statistical analyses concerning gross sales and commission figures for the various health spa locations for a period of time from 1971 to 1978 (Exhibits 4, 5, 6, 7, 11, 13, 14, 15, 16, 17, and 18). The parties also reintroduced as Exhibit 21 their prior April 10, 1979 Stipulation of Facts upon which this court factually predicated its prior summary judgment decision.

After a review of all the evidence submitted, this court concludes that the defendants have established by a preponderance of the evidence that the pay differential in question was justified by one or more of the statutory exemptions contained in the Equal Pay Act. *E.E.O.C.* v. *Aetna Insurance Co.*, 616 F.2d 719 (4th Cir. 1980). Specifically, this court finds that the commission payments in question were made pursuant to "(iii) a system which

measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(iii)(iv). The balance of this opinion represents the court's findings of fact and conclusions of law in narrative form.

In order to avoid needless repetition, the court will first incorporate in this opinion its prior summary judgment opinion dated September 14, 1979, finding that that opinion accurately sets forth the applicable law, the facts as stipulated to by the parties, and the relevant factual and legal backdrop against which this case is to be decided. This opinion, in effect, is a supplemental opinion to the summary judgment opinion previously issued directing attention to the alleged disputed questions of material facts which formed the basis for the remand from the court of appeals. At the conclusion of the trial and during closing arguments, this court questioned both counsel relative to what they perceived to be disputed issues of fact. There were none. The only question presented by this litigation is the correct legal interpretation that is to be placed upon the facts which are not in dispute.

In April, 1979, the parties stipulated, *inter alia*, to the following:

> At all material times, the volume of gross sales to females was consistently higher than gross sales to males, for the spas of Detroit Health. While there are variances from month to month, when measured over representative periods of time, the ratio of gross sales to females to gross sales to males is 60/40.

(Exhibit 21.) Since the parties have stipulated to this sales ratio, the court did not deem it to be a matter in dispute. Nonetheless, however, considerable testimony and a great number of exhibits were offered which fully documented that the sales ratio was in fact 60/40. Not only were the total sales

by year at all times roughly equivalent to this percentage breakdown (Exhibit 17), but the sales' ratios at individual spas also consistently held to this pattern (Exhibit 15). Additionally, defendants established through the deposition testimony of Jimmy Johnson that, to the degree there were statistics available, such statistics indicated that this same ratio between males and females generally prevailed throughout the United States in those spas that catered to both male and female customers. Mr. Johnson also testified that there was, in general, a larger market for women in the spa business and that several large national concerns had in fact converted entirely to servicing females only. It was thus established that defendants are engaged in a business in which there are more potential female customers than male and in which history has demonstrated conclusively that the membership breakdown will be sixty percent female and forty percent male. In short, defendants have shown by a preponderance of the evidence that a male manager and a female manager, sitting at the same desk in the same spa and expending the same amount of effort, under totally equal conditions, will have a net sales result of six membership sales to females and four membership sales to men. This is not to suggest that on a one-to-one basis a sale to a potential woman customer is any easier than a sale to a male customer. To the degree that this court's opinion on the summary judgment motion referenced easier sales to women, it was not intended to be a qualitative analysis but a quantitative one. There are simply more potential female customers in a consistent ratio of 60/40 and, with the same expenditure of effort, male and female managers will produce sales figures resulting in a 60/40 female/male membership. The net result of this is that, since the commission rates of seven and one-half percent for men and five percent for females are pegged to this same ratio, female and male managers at the same location will make, for all practical purposes, the same salary. To the degree that there are differentials, as many times as not the female manager will make more money than her male counterpart.

The defendants have thus, based upon figures that have been conclusively proved to be historically accurate, seized upon a system for equalizing pay rather than having established a system which is discriminatory in a manner violative of the Equal Pay Act. It is understandable that a woman manager would feel that she has an argument for making more money than her male counterpart. This would be true if the commission system were thrown out and managers were paid identical salaries. Undoubtedly, the female managers would point to the fact that they are generating more memberships than their male counterparts as an argument in support of a larger salary. The Equal Pay Act, however, only commands equal pay for equal work. It does not command an employer to give absolute numerical recognition to the balance-sheet significance of the equal work efforts of male and female employees.

It was apparent from the testimony offered at trial that the life blood of the spa industry is the continued sale of memberships. It is for this reason that managers are compensated entirely on a commission basis. Although managers do have supervisory responsibilities for their spa employees, it is clear that they are instructed and fully realize that their primary responsibility is for the continued sale of memberships. Top management closely monitors the sale efforts of each spa location and, in the event that there is any significant statistical departure from what history has demonstrated should be the sales results, it is a red flag to management that something is amiss at that particular location.

The testimony at trial also indicated that where history has shown that under certain circumstances the historical 60/40 ratio does not prevail, then it is not imposed upon the male and female employees. For example, when a new spa location is opened, such as was done in 1974 in Sterling Heights, Michigan (Van Dyke spa), management is aware that sales initially will not conform to the traditional 60/40

breakdown. The testimony at trial showed that in such a case the male and female manager who were working the spa before it formally opened were paid identical salaries without regard to the volume of business that they generated. Thus, defendants indicated an awareness of the concept of equal pay for equal work and where historical trends would not command this result they have altered their system to effectuate it in other ways.

Plaintiffs placed heavy emphasis at trial upon Exhibit 18 which is a comparison of men and women managers at *different* locations. The exhibit was an attempt to demonstrate that a man at one location generating approximately the same amount of business as a woman at another location would make more money. There are two problems with this exhibit. First of all, what it purports to demonstrate is obvious. If a man and woman both generate the same volume, then the man receiving a seven and one-half percent commission will obviously receive a larger commission than a woman receiving five percent. The exhibit totally overlooks the historical basis on which the 60/40 ratio is predicated. Additionally and perhaps more significantly, the exhibit does not take into cognizance the fact that the Equal Pay Act provides that "no employer having employees subject to any provisions of this section shall discriminate, *within any establishment* in which such employees are employed, between employees on the basis of sex. . . ." Although in some instances a business with more than one location might be looked at as unitary and be held to be one "establishment," this court concludes that each of the spas in question constitute a separate establishment for the purposes of this litigation. *Gerlach* v. *Michigan Bell Telephone Co.*, 448 F. Supp. 1168 (E.D. Mich. 1978), is helpful in this regard. In dealing with this same question of "establishment," Judge Joiner stated at 1171-72:

> The term "establishment" has not been expressly defined in the Fair Labor Standards Act. The United

State Supreme Court, however, has considered the issue of whether the term "establishment," as used in 29 U.S.C. § 213(a)(2), refers to an entire business enterprise or only a distinct physical place of business. *Phillips* v. *Walling*, 324 U.S. 490, 65 S.Ct. 807, 89 L.Ed. 1095 (1944). The Court held that "establishment" means a distinct physical place of business. *Phillips, supra,* at 496, 65 S.Ct. 807. This holding was reaffirmed in *Mitchell, Secretary of Labor* v. *Bekins Van & Storage Co.*, 352 U.S. 1027, 77 S.Ct. 593, 1 L.Ed.2d 589 (1957). Although the definition of "establishment" in *Phillips* was reached in the context of interpreting an exemption from the coverage of the minimum wage provision of the Fair Labor Standards Act in as narrow a fashion as possible, that definition has been adopted by the Secretary of Labor for purposes of administering the coverage of the Equal Pay Act of 1963. 29 C.F.R. 800.18 (1976). *See* 29 C.F.R. 800.013. This interpretation by the Secretary, which preserves a single definition of the term "establishment" throughout the various sections of the Fair Labor Standards Act, comports with the general intent of Congress in adding the equal pay provision to the Fair Labor Standards Act rather than drafting an entirely new piece of legislation.

The testimony offered in this case clearly dictates the logic of treating each individual spa as an "establishment." There are tremendous differences in the business that will be generated at a given spa based upon the neighborhood in which it is located, the newness of the spa, and whether facilities are provided for men and women on a daily basis, or whether they must use the same facilities on alternate days. To compare the sales efforts of a manager at one spa with the sales efforts of a manager at another spa would be a classic example of comparing apples to oranges. When the separate spa locations are examined, it is apparent that the salaries of the male and female managers at each individual spa are virtually identical.

September 11, 1981 Opinion of U.S. District Court for the Eastern District of Michigan.

In summation, this court finds that the defendants, by a preponderance of the evidence, have established that a male and female manager, working at the same location, under the same conditions, and expending the same work effort will receive nearly identical salaries. Since sixty percent of the business, however, will be female and forty percent of the business will be male, this result can only be achieved by a commission differential that parallels the historic membership differential. This is achieved by paying male managers seven and one-half percent commissions on their sales and female managers five percent on their sales. The court thus concludes that this remuneration system is not violative of the provisions of the Equal Pay Act.[1]

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[1] In the interest of referencing all of the matters that the parties placed in evidence, the court will touch briefly upon two matters which it does not consider outcome-determinative insofar as this litigation is concerned.

In 1975, there was a brief period of time in which the defendant departed from its straight commission remuneration basis and paid male and female managers a flat salary, plus commission. The salaries were identical but the commission rate for males was three percent and the commission rate for females was two percent. The salary plus commission pay system was instituted in response to a sales slump which had resulted from bad publicity arising out of a civil litigation in which defendants were then involved. In order to guarantee the managers a fair wage during that period of time, it was necessary that they be compensated on other than a straight commission basis. Interestingly enough, the prime reason for the bad publicity and litigation was that the spas were being overused by females. Female members felt that they were not able to properly receive the benefits of their membership, since the female division facilities were so crowded. This is another piece of evidence that is supportive of the fact that, historically, this simply is a female oriented business when dealing with spas such as those run by defendants.

The parties also introduced and/or alluded to determinations of various administrative agencies which had over the years investigated one phase or another of defendant corporation's salary plan. No witnesses were called relative to these determinations, nor were the determinations even alluded to by the attorneys for plaintiffs or defendants in closing arguments. There is nothing before the court relative to these determinations that would indicate the nature and scope of the investigation that was made, if any, and, accordingly, the court is able to attach little or no weight to any of the determinations made, some of which were supportive of plaintiffs' contentions and some of which were supportive of defendants' contentions.

A judgment of no cause of action will be entered in favor of the defendants.[2]

(s) RALPH B. GUY, JR.
United States District Judge

Dated: SEP 11 1981

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[2] As indicated, *infra*, at page three, the court decided this case on the basis of the defendants' having established by a "preponderance of the evidence" that the pay differentials were justified by one or more of the statutory exceptions. The recent United States Supreme Court decision in *Texas Dept. of Community Affairs* v. *Burdine*, 101 S.Ct. 1089 (1981), however, may be argued by analogy to reduce defendants' obligation to only having to "articulate" reasons for its conduct which fall within one of the statutory exceptions, with the total burden of proof always remaining with the plaintiffs. *Burdine*, of course, was a Title VII case and did not deal specifically with the Equal Pay Act. There has, however, been a significant amount of judicial cross-referencing between Title VII and the Equal Pay Act.

September 11, 1981 Judgment of U.S. District Court for the Eastern District of Michigan.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENISE BENCE ET AL,

vs.

DETROIT HEALTH CORPORATION ET AL

CIVIL ACTION
FILE NO. 7-70256

JUDGMENT
(Entered September 11, 1981)

This action came on for trial before the Court, Honorable Ralph B. Guy, Jr., United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment in hereby entered in favor of the defendants Detroit Health Corporation and William F. Hubner against the plaintiffs Denise Bence, Shirley Stan, Kay Grobbel (a/k/a Kay Harrington), Teddi Reardon, Sherry Pringham, Joane Gambino, and Cindy Vezinau of no cause of action.

Costs to be taxed.

Dated at Detroit, Michigan, this 11th day of September, 1981

IT IS SO ORDERED:

/s/ RALPH B. GUY, JR.
United States District Judge

JOHN P. MAYER
Clerk of Court
By: /s/ Marilyn A. Evers
Deputy Clerk

July 11, 1983 Judgment of U.S. Court of Appeals for the Sixth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENISE BENCE, et al.,
Plaintiffs-Appellants,

vs. NO. 81-1632

DETROIT HEALTH CORPORATION, et al.,
Defendant-Appellees.

Before: ENGEL, Circuit Judge, WEICK, Senior Circuit Judge; and BALLANTINE, District Judge.

JUDGMENT
(Filed July 11, 1983)

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded for further proceedings in conformity with the opinion of this Court.

It is further ordered that Plaintiffs-Appellants recover from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, *Clerk*

July 11, 1983 Judgment of U.S. Court of Appeals for the Sixth Circuit.

Issued as Mandate: September 27, 1983

COSTS: APPELLANT TO RECOVER

Filing fee	$
Printing	$286.74
Total	$286.74

Attest:
/s/ Linda L. Brinson, *Deputy Clerk*

September 19, 1983 Order of U.S. Court of Appeals for the Sixth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENISE BENCE, et al.
Plaintiffs-Appellants

v. NO. 81-1632

DETROIT HEALTH CORPORATION, et al.
Defendants-Appellees

Before ENGLE, Circuit Judge, WEICK, Senior Circuit Judge, and BALLANTINE, U. S. District Judge.*

ORDER
(FILED SEP 19 1983)

A majority of the active judges of this court not having voted in favor of rehearing the above case en banc, the petition for rehearing was referred to this panel for consideration by the Chief Judge George Edwards.

Upon consideration of the petition for rehearing, we are of the opinion that the issues in this case were adequately treated in the majority opinion of the panel filed in this case, and that the petition for rehearing should be and is hereby denied. Judge Engel adheres to his partial dissenting opinion.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

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* The Honorable Thomas A. Ballantine, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

September 18, 1964 Opinion Letter of U.S. Department of Labor Wage and Hour and Public Contracts Divisions.

U. S. Department of Labor
Wage and Hour and Public Contracts Divisions
Washington, D. C. 20210

24 AB 703
24 AB 706

September 18, 1964

This is with further reference to your letter of November 14, 1963 in which you describe the following situation and raise questions concerning the application of the equal pay provisions of the Fair Labor Standards Act.

Company X hires salesmen and saleswomen in the company's retail store, in the same department, to sell the same merchandise. They are paid on the basis of draw against commission, whichever is the higher figure.

The men spend approximately 10-15% of their time in stockwork, thereby losing a substantial amount of time off of the floor earning commissions. The women do no stockwork at all, but only sell. In order to compensate for the lost time, the men are given a higher draw and a higher rate of commission than are the women. This difference in duties is stated to be understood by the employees and management to be the reason for the difference in commission rate and amount of draw guaranteed.

The time spent by the men in stockwork varies with the season and the speed of business on the given day. The stockwork might take up as much as 20% of the salesmen's worktime on a slow day, or on a day during which new stock comes in. Some days, on the other hand, the proportion might be below 10%.

September 18, 1964 Opinion Letter of U.S. Department of Labor Wage and Hour and Public Contracts Divisions.

Your letter does not contain enough information to determine whether the jobs described are equal within the meaning of the act. While it is true that a substantial amount of work considered different in terms of the "skill", "effort", and "responsibility" required for its performance would provide a sufficient difference in job content to place a job outside the purview of the equal pay provisions, it will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle in order to effect an overall comparison. This is particularly applicable when, as in your example, the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time. (See sections 800.107 through 800.111 of the enclosed Interpretative Bulletin, Part 800.)

However, even though the employees involved are found to be performing "equal work" within the meaning of the act, the payment of a higher commission rate to some employees would not necessarily be in violation of the equal pay provisions of the act if the employer can show that the differential is not based on sex but, as you indicate, merely to compensate those employees performing stock work for time lost on the sales floor. In such a case, the employer would have to show that there is a reasonable relationship between the amount of the differential and the weight properly attributable to the factor other than sex. (See section 800.115(d) of the bulletin.) It would seem, for example, as between male and female salespersons of comparable competence, that where a higher commission rate is paid for the reasons you indicate, the earnings of the male and female salespersons should be equal in the final analysis since the differential is allegedly paid to effect an equalization of earnings.

September 18, 1964 Opinion Letter of U.S. Department of Labor Wage and Hour and Public Contracts Divisions.

On the other hand, where earnings histories reflect an imbalance among employees of opposite sexes who are of comparable competence, performing "equal work", and who are paid as you describe, it may be that the differential paid is, in fact, based on sex and not on the work actually performed by such employees. Such a differential would be in violation of the Equal Pay Act.

The payment of a higher draw to employees receiving the higher commission rate would not seem consistent with efforts to equalize earnings. This feature indicates that the employer expects the higher commission rate employees to earn a higher wage than the employees given the lower draw and lower commission rate.

Written statements submitted by interested parties and the transcript of the recent hearings on the Equal Pay Act of 1963 are available to the public for reference purposes in room 5139 of the Department of Labor building located at 14th and Constitution Avenue, N.W., Washington, D. C. 20210. These materials are not, however, available for public distribution.

Sincerely yours,

/s/ Clarence T. Lundquist
Administrator

Enclosure

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No. 83-992

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1983

DETROIT HEALTH CORPORATION and
WILLIAM F. HUBNER,
Petitioners,

v.

DENISE BENCE, et al,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an employer may avail itself of the affirmative defense, of a "factor other than sex" where it pays only its female employees, who cause and generate substantially more gross sales than its male employees, at a lesser wage rate for selling the exact same product as its male employees?

TABLE OF AUTHORITIES

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1983

No. 83-992

DETROIT HEALTH CORPORATION and
WILLIAM F. HUBNER,
Petitioners,

v.

DENISE BENCE, et al
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW, JURISDICTIONAL STATEMENT, STATUTES INVOLVED

The Respondents, DENISE BENCE, et al, respectfully request that this Court deny the Petition for a Writ of Certiorari, seeking review of the Sixth Circuit's Opinion reported at 712 F2d 1024 (6th Cir 1983).

The Petitioners' reference to the Opinions Below, Jurisdictional Statement, and Statutes Involved are deemed sufficient by Respondents and will not be restated pursuant to Supreme Court Rule 40.

QUESTION PRESENTED

Whether an employer may avail itself of the affirmative defense, of a "factor other than sex" where it pays only its female employees, who cause and generate substantially more gross sales than its male employees, at a lesser wage

rate for selling the exact same product as its male employees?

STATEMENT OF THE CASE

A. History Of The Case

The Respondents adopt the Petitioners' statement of the history of the case.

B. Material Facts On Review

The material facts necessary for review are cogently stated in Senior Circuit Judge Weick's majority Opinion and are reprinted herein.

> "Plaintiffs-Appellants ('employees') are former employees of Detroit Health Corporation ('employer'). At all relevant times employer operated a chain of health spas, each of which was divided into a men's division and a women's division which operated on alternate days. Men operated the men's division and women operated the women's division. Employer's managers and assistant managers were paid, except for a sixth month period in 1975, by commissions based on gross sales of memberships. Male managers were paid 7.5% of the individual spa's gross sales of memberships to men. Female managers were paid 5% of gross sales of memberships to women. Male assistant managers received 4.5% of gross sales to men. Female assistant managers received 3% of gross sales to women.
>
> Over the course of employer's life, the gross volume of membership sales to women was 50% higher than the gross volume of membership sales to men. There was no difference in the job description of male and female managers or assistant managers and they performed their jobs under similar working conditions. The total remuneration received by males and females was substantially equal although the females made more sales

than the males." *Bence* v *Detroit Health*, 712 F2d 1024 (6th Cir 1983) [footnote omitted]; Petitioners' Appendix 2a.

REASONS FOR DENYING THE WRIT

A. The Alleged Conflicts Between The Sixth Circuit, And Other Courts Of Appeal, 1964 Interpretive Opinion Of The Wage And Hour Division, And District EEOC Determination Are Illusory And Distinguishable.

1. Third And Ninth Circuits

The alleged conflicts between the Sixth Circuit's Opinion in the instant case and the Third Circuit in *Hodgson* v *Robert Hall Clothes, Inc*, 473 F2d 589 (3rd Cir), *cert denied*, 414 US 866 (1973) and the Ninth Circuit in *Kouba* v *Allstate Ins Co*, 691 F2d 873 (9th Cir 1982) are illusory because the Sixth Circuit was not required to choose between a limited or expansive interpretation of exception (iv) of the Equal Pay Act to decide this case. The Petitioner simply failed to prove that the sex of the employee (female) was not a factor in the commission differential. The Sixth Circuit determined that the segregating of male and female employees into the men's and women's departments "*plus* application of a lower commission rate *only* to those who sold memberships to women effectively locked female employees, and only female employees, into a inferior position regardless of their effort or productivity." Since the lower commission rate could apply only to women, we do not believe employer has proved that "sex provided no part of the basis for the wage differential." *Bence* v *Detroit Health Corp*, *supra*, [citation and footnote omitted]. Petitioners' Appendix 12a, 13a. Based on the above determination, the Sixth Circuit held "only that an employer may not avail itself of the affirmative defense under §206(d)(iv) where it compensates male and female employees solely for selling the exact same product, only female employees can be compensated at a lower commission rate, and the

differential is not justified by any difference in economic benefit to the employer". *Id*, Petitioners' Appendix 13a.

Even though it makes no judgment as to whether the *Kouba* and *Robert Hall* interpretation should apply, the Court reviewed the Petitioners' argument under *Robert Hall* and found that its "economic benefit" argument to be without merit as, unlike *Robert Hall*, in the instant case, there is no difference in the product sold by the male and female employees, and in fact, the women employees provide more profit than their male counterparts not less. *Bence* v *Detroit Health Corp, supra;* Petitioners' Appendix 12a.

2. Wage And Hour Opinion

The factual situation in the Wage And Hour Opinion found in the Petitioners' Appendix 48a-50a, is distinguishable factually, wrong in its interpretation, and is of questionable value.

First, the opinion letter points out that there is not enough information to determine whether the jobs described are "equal" pursuant to the Equal Pay Act. In the instant case, there is no question that the male and female employees perform the same job. Additionally, the differential in draw was not consistent with the employer's avowed purpose of equalized earnings. Similarly, in the instant case, Petitioners' claim of equal remuneration is suspect as revealed in this case when the 60/40 ratio of membership sales to women and men broke down and the commission differential was maintained. *Id.;* Petitioners' Appendix 13a, [footnote 4].

Second, the goal of equal total remuneration is unsupportable in this instance as the Equal Pay Act "commands an equal *rate* of pay for equal work". *Id;* Petitioners' Appendix 5a.

Third, the interpretive opinion letter issued in 1964 is of questionable value. "[I]t must be noted that as time passes

the difference due the regulations interpreting the Equal Pay Act will by necessity slacken, since these regulations, issued in 1965, have never been amended to reflect judicial constructions of the Act." *Hein* v *Oregon College of Education*, 718 F2d 912, 914 (9th Cir 1983).

3. District EEOC Determination

The Petitioner maintains that a district office letter of determination should be outcome determinative after a Trial on the merits. Such reasoning is clearly illusory and faulty. First, there were two reviews, one favoring the Petitioner and one favoring the Respondents. Second, as described by the District Court in its September 11, 1981 Opinion:

> "No witnesses were called relative to these determinations even alluded to by the attorneys for plaintiffs or defendants in closing arguments. There is nothing before the court relative to these determinations that would indicate the nature and scope of the investigation that was made, if any, and, accordingly, the court is able to attach little or no weight to any of the determinations made, some of which were supportive of plaintiffs' contentions and some of which were supportive of defendants' contentions." Petitioners' Appendix 42a.

B. There Are No Special Or Important Reasons Mandating Review

First, review of the Sixth Circuit's decision would affect only the litigants in this case. Senior Circuit Judge Weick's majority Opinion was a narrow one. He stated:

> "Today's holding is a narrow one. We do not hold that an employer may not under any circumstances segregate male and female employees into separate departments and pay them different rates of wages. Nor do we endorse or reject the broad reading of §206(d) (1) (iv) set forth in *Robert Hall* and *Kouba*. Those are questions for another day." *Bence* v *Detroit Health Corp*, Petitioners' Appendix 13a.

Second, the Petitioners' arguments were fully considered and correctly decided by the Sixth Circuit with the majority opinion written by a most respected Senior Circuit Judge, and reviewed again pursuant to the Petitioners' request for a rehearing and a rehearing *en banc*.

Third, the groundswell clamoring for review is not quite as resounding as the Petitioner asserts as not all of the cases the Petitioner cited concern precisely the analysis of the "factor other than sex". In *Goodrich* v *Int'l Brotherhood of Elec Workers*, 712 F2d 1448, 1493 (DC Cir 1983), the reversal was based on genuine issues of material facts concerning prima facie case considerations of unequal work rather than the "factor other than sex". The Fifth Circuit reversed the District Court in *Plemer* v *Parsons-Gilbane*, 713 F2d 1127, 1137 (5th Cir 1983), on an evidentiary ruling wherein the District Court excluded the plaintiffs' statistical evidence on rebuttal.

CONCLUSION

For these reasons, a Writ of Certiorari should not issue in the within case.

Respectfully submitted,

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Dated: January 9, 1984
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